IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.102 OF 2005

IN

SUIT NO.61 OF 2005

...

M/s.Black Diamond Trading Co. ...Plaintiffs

v/s.

Maharashtra State Electricity

Board & Ors. ...Defendants

...

Mr.N.J.Thakkar with Mr.Y.R.Shah for the Plaintiffs.

Mr.D.D.Madon i/b M/s.M.V.Jaykar & Co. for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 27TH JANUARY,2006

P.C.:

1. This Notice of Motion is taken out by the Plaintiff. The learned Counsel appearing for the Plaintiff at the outset stated that the Plaintiff prays for interim order only in terms of prayer clause (c). By prayer clause (c) the Plaintiff prays for a mandatory order directing the Defendant to permit the Plaintiff to lift the coal reject to the extent of 4712.750 metric tonnes for which the Plaintiff has already paid.

2. The Plaintiff has filed the suit for a decree of declaration that the sale order dated 9-3-2004 issued pursuant to the auction held by the Defendant on 8th March, 2004 is valid, binding and subsisting. The Plaintiff also prays for permanent injunction. Basically the case of the Plaintiff is that the Plaintiff has at the auction sale purchased rejected coal from the Defendants for the price stated in the contract. According to the Plaintiff, the Defendant has committed breach of that contract and therefore the suit is for specific performance of that

contract.

3. For granting any interim order in favour of the Plaintiff, the court first will have to be satisfied that the Plaintiff has a strong prima facie case. Perusal of the averments in the plaint shows that in truth and substance what the Plaintiff is claiming is a decree for specific performance of the contract for sale of the commodity which is agreed to be sold and purchased i.e. rejected coal which is the moveable property. Perusal of the provisions of section 14 of the Specific Reliefs Act shows that that section in terms lays down that the contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced. It is further to be seen here that Section 10 of the Specific Relief Act raises a statutory presumption that breach of contract to transfer moveable property is capable of being compensated by awarding compensation in terms of money. Therefore, in order to be entitled to get a decree of specific performance of contract to sell the moveable property, the Plaintiff will have to plead and prove that the moveable property involved is not an ordinary article of commerce and is of special value

and interest to the Plaintiff or consists of goods which are not easily available in the market or where the Plaintiff is able to show that the Defendant was holding that property as the agent or the trustee of the Plaintiff.

4. I do not find that the Plaintiff has made out such a case in the plaint. According to the learned Counsel appearing for the Plaintiff, it is the case where the Plaintiff seeks specific performance because the Plaintiff has already paid for the coal, but the Defendant is not permitting the Plaintiff to lift that coal. In my opinion, submission is not well founded. Even assuming that the Plaintiff has paid for the commodity, which is in possession of the Defendant, unless the Plaintiff succeeds in getting a decree of specific performance, he will not be able to take possession of those goods.

5. One more aspect, in my opinion, which is required to be seen is that the Plaintiff by prayer clause (b) is asking for mandatory injunction. The settled law is that as the mandatory order is in the nature of granting final relief, unless the Plaintiff makes open and shut case the Plaintiff is not entitled to a

mandatory order from the Court.

6. Taking overall view of the matter, therefore, in my opinion, as the Plaintiff is not able to show any prima facie case that he will be entitled to get a specific performance of the contract of the moveable property, the Plaintiff is not entitled to any interim order. Notice of Motion is, therefore, disposed of.

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